83-768

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ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1983

GORDON H. FAULKNER, et al.,

Petitioners,

vs.

BRUCE D. WELLMAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit has Decided this Case in a Way in Conflict with Controlling Decisions of this Court by its Failure to Rely upon and apply Objective Criteria to an Analysis of Eighth Amendment Claims concerning the Indiana State Prison.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Gordon H. Faulkner, Commissioner of Indiana Department of Correction, Jack R. Duckworth, Superintendent (formerly Warden) of the Indiana State Prison, Edward Jones, Director of Classification and Treatment at the Indiana State Prison, Norman Hunt, Director of Classification and Treatment for the Indiana Department of Correction, Cloid L. Shuler, Executive Director for the Adult Authority for the Department, Dean Nietzke, Director of Health Care Services for the Department, Ronald Freake, Health Care Services Administrator at the Prison, Roger D. Saylors M.D., Major

Gothel D. Wilkins, Captain Eugene Koziatek, Sgt. Bryon Glick, Lt. Robert McKee, Officer John M. Sharp, Lt. John Riggs, Officer Bill J. Kennedy, Lt. David G. Oden, J.F. Kozlowski, P.G. Youngblood, Bob Glancey, R. Shriner, Rodney Keith, and Ronald Batchelor respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in cause numbers 81-3060 and 81-3061 on August 9, 1983, which affirmed in part, vacated in part, and remanded to the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court).

Respondents are James Odis Hendrix, Grady Thomas Bobbitt, Melon Carroll, Donald R. Sceifers, James Blackburn, Billie R. Adams, Bruce D. Wellman, Dwight Walker, Douglas Shackelford a/k/a Achebe H. Lateef, Raymond Hurt, Richard Colvin, and Stewart Brooks, all offenders confined at the Prison at the time their respective cases were filed in the District Court. The District Court certified the causes as a class action, the class consisting of "those prisoners who are, or may be in the future, confined at the Indiana State Prison, Michigan City, Indiana in the custody of the Indiana Department of Corrections."

OPINIONS BELOW

The decision of the Seventh Circuit issued on August 9, 1983, is reported at 715 F.2d 269 (7th Cir. 1983). The Memorandum and Opinion of the District Court, entered on October 21, 1981, is reported at 525 F.Supp. 435 (N.D. Ind. 1981), under the name of *Hendrix v. Faulkner*. Because the opinion of the District Court is voluminous, it is separately presented.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Rule 17 of the Rules of this Court.

The decision of the Seventh Circuit was entered on August 9, 1983. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101 (c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eight Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, suctom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from an affirmance in part, vacating in part, and remand for further proceedings by the Seventh Circuit. This cause concerns a civil rights action filed by offenders confined at the Indiana State Prison and who challenged conditions, policies, and practices at that institution.

B. Course of Proceedings

The original complaint in the *Wellman* action (No. S79-

32 in the District Court) was filed on January 18, 1979, naming as defendants the warden and other prison officials and employees, and certain officials of the Indiana Department of Correction. An amended complaint was filed on December 4, 1980. The prisoners sought damages for themselves and declaratory and injunctive relief on their own behalf and on behalf of the class.

Respondent Adams filed a *pro se* complaint under 42 U.S.C. §1983 on March 7, 1977 (No. S77-35 in the District Court). Supplemental complaints filed on April 7, 1977, and July 28, 1977, brought to nine (9) the total of prison employees named as defendants. Adams alleged constitutional violations similar in nature to those alleged by the *Wellman* plaintiffs. On December 5, 1977, the District Court dismissed Adams' claims, and he appealed. The order of the District Court dismissing Adams' complaint was vacated by the Seventh Circuit in an unpublished order dated June 3, 1979, and the cause was remanded to permit Adams an opportunity to prove his allegations. On remand, due to the similarity of Adams' allegations to those of the *Wellman* plaintiffs, on December 27, 1979, the District Court ordered the two cases consolidated for trial.

The complaint in No. 81-3061 was filed on November 4, 1976. On December 9, 1977, the District Court dismissed certain of the plaintiffs' allegations. At this time, there were twelve plaintiffs, each an offender incarcerated at the Indiana State Prison, Michigan City, Indiana. In summary, the plaintiffs challenged the conditions of their confinement as being in violation of the Constitution. On September 25, 1979, the District Court appointed counsel to represent the plaintiffs. Each side waived trial by jury.

On July 30, 1980, at the request of plaintiffs, No. 81-3061 was consolidated with the other two cases before the District Court. Trial was held in the three consolidated cases in January and February, 1981, covering eleven court days. On October 21, 1981, the District Court entered

judgment, awarding a total of $2,000.00 in damages to three of the named plaintiffs in No. 81-3061—James Odis Hendrix, Grady Thomas Bobbitt, and Melon Carroll. In addition, the District Court ordered a staged reduction in population at the Prison and further that the offenders confined on the Admissions and Orientation Unit ("A & O") be released from their cells not less than three hours per day, with one of these three hours to be out of doors at the option of the offender.

Petitioners moved to amend the judgment, which motion was denied on November 25, 1981, with the exception of correcting a clerical error. The opinion of the District Court is reported at 525 F.Supp. 435 (N.D. Ind. 1981), and is contained in the appendix to this Brief. The District Court's Order of November 25, 1981, denying Petitioners' motion to amend is found in the Appendix at page A-3.

The *Wellman* and *Adams* plaintiffs and the defendants in each of the three consolidated case filed cross-appeals, which appeals were consolidated by the Seventh Circuit for briefing, argument, and decision.

The Seventh Circuit affirmed the District Court as to the staged reduction in population, the time-out-cell order relating to one unit of the Prison, and the denial of damages to prisoners who failed to prove personal responsibility of a named defendant. The awards of damages to respondents Hendrix, Bobbitt, and Carroll were vacated and remanded for a determination of whether the requisite personal liability of defendants was established at trial. The Seventh Circuit reversed the District Court's conclusion that there was not deliberate indifference to serious medical needs, and remanded for a determination of "further appropriate relief."

C. Facts Material to the Consideration of the Question Presented

There is no evidence showing or tending to show that increases in population or the current levels of population

cause actual, physical pain. The District Court's sole conclusion with respect to crowding is that it leads to limited time out of cell. There is no credible evidence and no finding of fact that the current level of population has resulted in an unacceptable level of safety leading to attacks on offenders. There is no evidence that the level of population has resulted in persons sleeping on dirty floors crawling with vermin. No evidence was produced to show an escalation of violence with an escalation in population, or any relationship between violence and population density. There is no concrete evidence that population density has led to widespread outbreaks of contagious diseases. The Respondents failed to prove, and the District Court did not find, sufficient facts upon which to base any conclusion that the Prison is unconstitutionally overcrowded.

The only "facts" from which the District Court could have concluded that the Prison is unconstitutionally overcrowded are merely subjective opinions. The only opinion cited by the District Court is that of Cloid L. Shuler, Executive Director of the Adult Authority for the Indiana Department of Correction. Mr. Shuler gave an administrative capacity of 1750, which is the figure that the District Court mandated be achieved by December 31, 1982. However, that capacity is one beyond which facilities and resources are strained, and not one beyond which violence becomes rampant. (R.p.2030). Rated capacity is an ideal toward which prisons strive, and do not constitute a minimum constitutional requirement. In addition, "expert" witnesses believed the Prison to be overcrowded, but these opinions, like standards adopted by organizations, are merely recommendations and simply do not establish the constitutional minima; rather, they establish goals recommended by the private organization.

Much of the medical evidence is in the nature of a disagreement among doctors. Dr. Shansky and Dr. Hastings disagreed on nearly everything. The examples used by Dr. Shansky do not involve any life-threatening

situations. While errors are made, the cases he chose are difficult cases. A diabetic who missed a few injections and had a few injections reversed, constituting a very small percentage and having no adverse impact, (R.pp.791, 2084) a diabetic who received an unnecessary but harmless test, (R.pp.744, 2094) and a heart patient who wanted physical therapy but was found not to be likely to benefit do not show deliberate indifference (R.pp.752, 2119). Dr. Shansky's complaints were either wrong, as in the case of the person he thought was receiving a potentially lethal dose of medication (R.pp.748, 2106-07) or of such a trivial nature that they show nothing about the system, as in the case of the medical technician who opined that a person was not ill and who referred the patient to a physician in any event (R.p.743). The two doctors disagreed numerous times on questions of medical judgment, as in the case of the reason for the death of James Marshall (R.pp.753-54, 2123, 2188, 2190-91).

The system is not such that suffering is inevitable. The medical care received is adequate and is available. As seen in the charts in evidence, there is very little barrier to getting care (R.pp.2147, 2177). A civilian hospital is available and is frequently used—maybe overused (R.pp.2154-55). Staff is available at all times. While the record-keeping system is antiquated, it was not shown to have resulted in a denial of care (R.p.2163). It was not even shown to have resulted in anything the level of negligence.

The record establishes the following facts, each of which supports the District Court's conclusion that there is no constitutional violation.

The physical facilities of the infirmary are attractive. (Def.Ex. HHH). The infirmary is adequately staffed and equipped to provide twenty-four hour care. (Def.Ex. HHH; R.pp.1866-67). The medical services system at the Prison is a recently developed, basically sound system that is well oriented, well-integrated, and relatively well administered (R.pp.2078-79). The absence of a medical director at the

departmental level who is a physician has not interfered with the quality of the health services program at the Prison (Def.Ex. HHH, p.6; R.p.2131). There is a good use of providers with different levels of skills, as in modern hospital systems (R.p.2128). There is a good division according to level of care needed. (Def.Ex. HHH). Medical technicians do not write prescriptions (R.p.653). The Prison has a plan for medical emergencies that is detailed. (Def.Ex. M). There are three full-time physicians, three full-time physician's assistants and five medical technicians at the Prison (R.pp.636, 650). Continuing medical education for Prison medical staff is available (R.pp.1882-83). Each shift reports to the shift coming on the occurrences of the shift (R.pp.774, 1880-81). Physicians make rounds in segregation units every week (R.p.629).

Dentists are present for a combination of ninety-six hours per week (R.pp.717, 1891). A consulting oral surgeon is available (R.p.1891).

The full facilities of Memorial Hospital are available. (Def.Ex. HHH; R.pp.1876-78). A full range of consultants, in all areas except neurology, neurosurgery, and vascular surgery, is available or under contract (R.pp.1890, 2153). If needed, physiotherapy is done at Memorial Hospital (R.p.1907). Approximately forty-five patients each month are treated at Wishard Memorial Hospital in Indianapolis (R.p.1879). This includes amputees (R.p.1880). There is, if anything, over-referral to specialists, but not to the extent that the specialists cannot evaluate each patient properly (R.pp.2154-55).

Sick call for general population is available five days a week (R.p.916). There is found no evidence to substantiate the claim that large numbers of sick call requests are stopped by officers. The records show that there are few barriers to health care (R.pp.2147, 2177).

The examination equipment is up-to-date and in good repair. (Def.Ex. HHH; R.p.1889). The wards in the infirmary are used for persons not in need of skilled

nursing care. Such persons would be outpatients in the free world. (Def.Ex. HHH; R.pp.2136-37).

Although there are sometimes delays in getting supplies due to State law and procedures, these delays do not interfere with care. (R.pp.624, 1869-69, 1876). In the two years prior to trial, the Prison has received or let bids on an EKG machine, a new emergency room trolley, $2,500.00 worth of surgical instruments, a new trauma kit, a new x-ray plant, a new optometry basic unit, new microscope, new dry processor for x-rays, a new dental x-ray, and a cleaner for surgical instruments. (R.pp.1869-89). There is an approved paramedic kit in each shelter unit. (Def.Ex. HHH). The institution's ambulance is equivalent to one found in the free world. (Def.Ex. HHH; R.p.1886). Stab victims can be adequately stabilized at the infirmary for transport to Memorial Hospital. (R.pp.509-10). The laboratory services are good, There is no problem with using an offender to run tests if his information is limited to test values. (Def.Ex. HHH; R.p.736). Minor surgery only is performed at the Prison. (R.pp.1873-74).

The Medical Services Audit Review Committee consists of Dr. Freake, a physician, a physician's assistant, a medical technician, sometimes the dentist, and the psychologist when appropriate. (R.pp.615-16, 1926). Medical policies, including restrictions on length of a prescription with Audit Committee approval, are formulated by the medical staff and given to the Warden for his support. This is not interference with medical decisions. (Pl.Ex. 50, 51, 52; Hendrix Exhibits' 1, 2, 3, 4, 5; R.pp.622, 2337).

All newly arriving offenders receive an in-take examination. (Pl.Ex. 53; R.pp.631-32). Newly arrived lifers are kept in a secluded area until a medical examination can be completed. (Pl.Ex. 11). Annual physical examinations and medical histories are not effective, and the payoff would be low (R.p.2161).

No medications were found in the infirmary that were beyond the expiration date. (Def.Ex. HHH). The new unit-dose prescription system will be more efficient when fully in place (Def.Ex. HHH; R.pp.2166-67). Only if different physicians prescribe medications without records available is a prescription profile useful to reduce risks (R.pp.72-73). Aspirin is always available in the cellhouses. (Pl.Ex. 83, p.27). No plaintiff is in need of psychiatric care. (R.p.1044). The consulting psychiatrist is available for emergencies. (R.p.1936). No grossly disturbed offenders were found in housing units, which is rare among prisons. (Def.Ex. HHH). The psychiatric unit at Westville Correctional Center has alleviated, to some extent, the urgency of the need for on-site psychiatric care. (R.p.786). Westville's Psychiatric Unit is adequate to meet the needs of the Prison and of the entire Department. (R.pp.1048, 1844, 1847). Offenders who return from the Psychiatric Unit at Westville are followed up by the team consisting of a physician, the psychologist, and the assistant warden for programs. (R.pp.1928, 1931, 1947). It is better to be an "outpatient" from the Psychiatrist Unit in the general population of Westville. This is occurring and is to continue. (R.p.1050). The psychologist sees up to ten percent of the population in a month in both group and individual therapy. (R.p.1915). A program to help two hundred offenders in protective custody or on idle status is operating under a grant, with two out of three positions filled. (R.p.1921). There are at the Prison stress and relaxation therapy groups involving seventy-five to eighty, and psychotherapy including substance abuse counseling. (R.pp.1922-23, 1946). There is a good referral system in place at the Prison of offenders with mental health problems. (Def.Ex. GGG; R.pp.1810, 1823). Mental health services available to offenders at the Prison are relatively similar to those available through community, government-sponsored health agencies. (Def.Ex. GGG).

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit has Erroneously Decided a Question in a Way in Conflict with Controlling Decisions of this Court, by its failure to Apply Objective Criteria to an Analysis of Eighth Amendment Claims.

On June 15, 1981, this Court decided the case of *Rhodes v. Chapman*, 452 U.S. 337 (1981), in which this Court considered "for the first time the limitation that the Eighth Amendment...imposes upon the condition in which a State may confine those convicted of crimes." *Id.*, at 344-45. This Court held that the Eighth Amendment prohibits only those punishments that "involve the unnecessary and wanton infliction of pain'...or are grossly disproportionate to the severity of the crime..." *Id.*, at 346 (citations omitted).

A central message of *Rhodes* is that the Eighth Amendment does not proscribe prison conditions that do not, directly or indirectly, result in the infliction of actual, physical pain. Mere discomfort, frustration, or distress are not, in this context, matters of constitutional moment. "To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.... [T]he Constitution does not mandate comfortable prisons, and prisons... which house persons convicted of serious crimes, cannot be free of discomfort." *Id.*, at 347, 349, and 349 n. 14. Merely "psychological problems [such as] an increase in tension and aggression" (*Id.*, 349 n. 15) were viewed by this Court as constitutionally insignificant. It is "*serious* deprivations of *basic* human needs" that may be unconstitutional to the extent that they cause or lead to "pain without any penological purpose." *Id.*, at 347 (emphasis added). Deprivation of "life's necessities" may be "cruel and unusual under the contemporary standard of decency that we recognized in [*Estelle v.*] *Gamble*, [429 U.S. 97 (1976)]." *Id.*, at 347.

Finally, this Court held that judgments respecting conditions must be informed by "objective factors" and must reflect "objective indicia," and that "'Eighth Amendment judgments should neither be nor appear to be merely the subjective views' of judges." *Id.*, at 346, quoting *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). *See also, Solem v. Helm*, ___ U.S. ___, 103 S.Ct. 3001, 3010-11 (1983). In order to find a condition to be cruel and unusual, there must be a "concrete injury," a demonstration in the evidence the specific condition "either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." *Id.*, at 347.

The District Court concluded and the Seventh Circuit upheld the conclusions, that there was no validity to Respondents' claims relative to the Prison's physical environment, the level of violence, the use of body cavity searches, harassment of visitors, interference with mail, management of offender property, the adequacy of the grievance system, the safety of work lacerations, disciplinary procedures, vermin control, and diet. The District Court and the Seventh Circuit pointed to only two arguably "objective facts"—the routine maintenance and excessive periods of time spent in cells by offenders on one, very small (in terms of its population) unit of the Prison. These problems (if, indeed, they are of a constitutional magnitude) are susceptible of remedies other than the drastic and potentially devastating reduction, which step necessarily impacts not only upon the Prison but upon the entire criminal justice system of the State of Indiana. The District Court ordered—and the Seventh Circuit affirmed—more time out of cell for offenders on the one unit in which offenders were found to be locked in their cells for too great a period. The claimed problem of routine maintenance is an administrative detail that can be dealt with short of population reduction. Different management techniques and procedures could render this "problem" a moot point without the drastic action of reduction in population.

The figures determined by the District Court and affirmed by the Seventh Circuit lack any "objective indicia." The ultimate reduction to 1615 finds no basis in the record, and is therefore nothing more than the "subjective view" of judges. The closest "fact" to this figure is that there are approximately 1615 cells for general population. This does not include specialized cells (i.e., medical and disciplinary segregation or protective custody), dormitory space, or the fact of large, two-person cells in the honor cellhouse about which no one complained. There is a constant, predictable population in each of these areas. Thus, even given a one-man one-cell position, there is no objective factor demonstrating that 1615 is an appropriate level of population. The District Court virtually picked the number out of thin air and the Seventh Circuit affirmed the figure as "broadly supported by the Record," pointing only to the age of the Prison and the length of time out of cell for the fifty-three (53) offenders in one unit. Neither the District Court nor the Seventh Circuit found any other adverse effect of the population level. It is noteworthy that neither Court found a constitutional violation in the amount of time out of cell for the vast majority of offenders (the general population), in the physical plant per se, in the staffing levels or training, or in the level of violence. These crucial objective factors point to a finding of an acceptable rather than over-crowded population level.

The Seventh Circuit erroneously affirmed the decision and order of the District Court in the absence of any objective indicia of a violation of the Eighth Amendment, in contravention of the applicable decisions of this Court. Therefore, a writ of certiorari should issue.

The Seventh Circuit has also erroneously affirmed the decision and order of the District Court that offenders confined on the Admissions and Orientation Unit ("A & O Unit") be given three hours out of their cells daily, with one of the hours to be out of doors at the option of the offender.

This conclusion is in conflict with controlling decisions of this Court, of the Seventh Circuit, and of other Circuit Courts of Appeals.

"Deprivation of exercise *per se* does not violate the cruel and unusual clause...." *Miller v. Carson*, 563 F.2d 741, 751 n. 12 (5th Cir. 1977). And in *McCray v. Sullivan*, 509 F.2d 1332, 1335 (1975), the Fifth Circuit affirmed a district court's refusal to order that exercise be made available to offenders in administrative segregation. The Seventh Circuit itself, in interpreting and applying *Rhodes v. Chapman*, held that "unrelieved confinement in cells" and "lack of recreational opportunities" do not state a cause of action. *Madyun v. Thompson*, 657 F.2d 868, 874-75 (7th Cir. 1981). The restrictive environment of the A & O Unit is necessary due to its purpose and function as a segregation unit. Neither the District Court nor the Seventh Circuit paid any attention to the function of the unit, in contravention of this Court's directive in *Rhodes v. Chapman* that to constitute a violation there must be "pain *without penological purpose*" (emphasis added).

The order relating to the amount of time out of cell on the A & O Unit is contrary to the controlling decisions of this Court, of other Courts of Appeals, and of the Seventh Circuit.

The District Court concluded that there was no deliberate indifference to serious medical needs of offenders at the Prison. The Seventh Circuit vacated this part of the District Court's decision and remanded for further relief. In so doing, the Seventh Circuit did not reject the findings of the District Court as unreasonable or as an abuse of discretion. That Court merely rejected the District Court, finding a language barrier, the absence of a psychiatrist, deficiencies in the care of one offender two years before trial, delays in care to three of the Respondents, and a lack of colostomy bags. Based upon these unrelated and isolated incidents, the Seventh Circuit found that the system will inevitably result in a great deal

of pain. Momentary lapses and isolated delays do not constitute "deliberate indifference to serious medical needs of prisoners," as required under *Estelle v. Gamble*, 429 U.S. 97 (1976). The Seventh Circuit totally ignored the finding of the District Court, just as it failed to even mention the Department's Westville Psychiatric Unit only a few miles from the Prison as an alternative to on-site, full-time psychiatric care. There was no evidence that the "language barrier" resulted in inadequate, delayed, or inappropriate health care. There was no evidence of that situations such as that involving the one offender were commonplace or inevitable. The Seventh Circuit's decision on medical care is nothing more nor less than a statement of the type of health care delivery system subjectively believed by that Court to be appropriate for a maximum security institution. The view is based upon isolated incidents and not upon either systemic deficiencies or objective criteria. The reversal is thus contrary to the decisions of this Court in both substance and procedure, and a writ of certiorari to review that determination should issue.

The decision of the Seventh Circuit is contrary to the controlling decisions of this Court. Therefore, a writ of certiorari to review the decision should issue.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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DAVID A. ARTHUR
Deputy Attorney General

Attorneys for Petitioners

Appendix

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA

	Consolidated Cases Civil Action File No.
JAMES ODIS HENDRIX et al	) S76-187
BILLIE R. ADAMS	) S77-35
BRUCE C. WELLMAN et al	) S79-32
	)
vs.	) JUDGMENT
	)
GORDON H. FAULKNER et al	)
JACK DUCKWORTH et al	)
GORDON H. FAULKNER et al	)

This action came on for trial before the Court, Honorable ALLEN SHARP, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that Plaintiffs HENDRIX and BOBBITT shall recover damages from the defendants in their official capacity in the amount of $500.00 each. Plaintiff CARROLL shall recover damages from the defendants in their official capacity in the amount of $1,000.00.

Defendants are ordered to begin a staged reduction of the inmate population at Indiana State Prison. That reduction must commence now and be concluded on the schedule here ordered. The inmate population at the Indiana State Prison must be reduced so as to not exceed a total of 1750 inmates by December 31, 1982. By December 31, 1983, additional reduction must be made so that the total inmate population shall not exceed 1615. Based on the evidence there should be and hereby is placed a ceiling on inmate population. On

and after January 1, 1984, no more than 1615 inmates shall be confined at the Indiana State Prison. The facts of this case and the Eighth Amendment compel this result. Further, all inmates housed in the A & O unit shall receive three hours a day of time out of cell. Outdoor exercise must be available at the option of the inmates for one of those three hours every day. Obviously, inclement weather may limit this time outdoors but such time shall be available at the inmates' option.

This Court shall retain jurisdiction of this cause. This opinion shall constitute the necessary findings of fact and conclusions of law under Federal Rule of Civil Procedure 52. The defendants shall file timely reports to the Court indicating their compliance with this order.

Each party will bear its own cost. The question of the award of attorney fees to plaintiffs' counsel under 42 U.S.C. §1988 is reserved for further proceedings.

Dated at SOUTH BEND, INDIANA, this 21st day of OCTOBER, 1981.

RICHARD E. THOMAS
Clerk of Court

BY TERESE M. HINKLE
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BRUCE D. WELLMAN et al *Plaintiffs*	)	
v.	)	No. S79-32
GORDON H. FAULKNER et al *Defendants*	)	
BILLIE R. ADAMS *Plaintiff*	)	
v.	)	No. S77-35
JACK R. DUCKWORTH et al *Defendants*	)	
JAMES ODIS HENDRIX et al *Plaintiffs*	)	
v.	)	No. S76-187
OTIS R. BOWEN et al *Defendants*	)	

ORDER

All defendants in these causes filed, by the Attorney General of the State of Indiana, a Motion to Amend the Judgment of this Court, which was entered October 21, 1981, pursuant to Federal Rules of Civil Practice 59(e). The stated purpose being to correct alleged manifest errors of law and fact. No new or additional evidence is offered.

The Court and parties agree that there is a mistake in regard to the size of the cells in I Cell House. On page 44 of the opinion this Court found that the "Cells in I Cell House

are 56 square feet in size." That finding should read that the "Cells in I Cell House contain 56 square feet per occupant, 112 square feet total." The opinion of the Court is hereby ordered amended to so read. No issue of double celling inmates in I Cell House was ever raised.

Secondly, the defendants contend that the final population ceiling of 1615 inmates fails to adequately consider K Dormitory, the reduced security housing immediately outside the prison walls. The defendants construe this ceiling as a simple mathematical calculation containing an error which would warrant an increase in the population ceiling. Such a construction seriously misreads the analytic framework applied by the Court, however inartful. For indeed, as the plaintiff's noted in their response a simple tabulation of the number of cells which comply with contemporary standards may well have resulted in a significantly lower ceiling. Rather, the analysis is that of the Eighth Amendment which compels consideration of the amalgam of conditions, past, present, and future, which make up the prison. Included in that is this Court's statement that all currently existing housing at the I.S.P. was considered. (Memorandum Opinion at p. 150). This ceiling arises from the Court's determination of the total capability of the correction system at the I.S.P. This Court was fully aware of the evidence alluded to by the defendants, understood the ramifications of its order in regard to population ceiling, and in light of the evidence can only consider said order restrained. Therefore, the Court declines to amend its judgment in this respect.

Thirdly, in regard to the incidents involving inmates Wadood (Love) and Chris Brown, the defendants contend that rebutting evidence compels different findings. However, this Court considered all the evidence in regard to these incidents and in light of the coherence and credibility of the testimony, found these facts. Further review by this Court at this time recalls those witnesses and

serves only to affirm those initial conclusions. Therefore, the Court declines to amend its judgment in these respects.

Finally, the defendants allege error on the part of the Court in awarding damages to plaintiffs Hendrix, Carroll and Bobbit. They assert the failure of the Court to enter a finding of personal involvement on the part of a named defendant as in *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). However, in the context of a class action alleging inadequate medical care the standard is provided by the Eighth Amendment, as interpreted in *Estelle v. Gamble*, 429 U.S. 97 (1976). *Estelle* requires a showing of deliberate indifference to a serious medical need. A plethora of cases have explained this to include systematic deficiencies in staffing, facilities, equipment or procedures. These individuals endured for extended periods of time a systematic failure to receive treatment, even though their ailments were made known. This Circuit has recognized that a denial of medical care to an inmate "may be of such a kind that the claimant will have had no personal contact with, or knowledge of the person directly responsible." *Duncan v. Duckworth*, 644 F.2d 653 (7th Circ. 1981). Therefore, the Court declines to amend its judgment in these respects.

Enter November 25, 1981.

Allen Sharp
JUDGE, UNITED STATES
DISTRICT COURT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 81-3060 and 81-3061
BRUCE D. WELLMAN, et al.,

Plaintiffs-Appellants, Cross-Appellees,

v.

GORDON H. FAULKNER, et al.,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.
Nos. 76 C 1877, 77 C 35 and 79 C 32—**Allen Sharp**, *Judge*

ARGUED SEPTEMBER 13, 1982—DECIDED AUGUST 9, 1983

Before BAUER and CUDAHY, *Circuit Judges*, and WEICK, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge*. In these consolidated appeals we consider whether the conditions of imprisonment at the Indiana state prison at Michigan City meet constitutional

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* The Honorable Paul C. Weick, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

standards. Plaintiffs challenge the adequacy of Michigan City's medical care, the condition of its physical plant, the level of violence, the amount of time prisoners must spend in their cells and certain prison procedures (or lack thereof) that allegedly heighten the level of tension in the prison. The district court found that the totality of conditions did not violate the eighth amendment but that certain specific constitutional violations were established. *Hendrix v. Faulkner*, 525 F. Supp. 435 (N.D. Ind. 1981). We affirm the district court's finding regarding the totality of conditions, its findings of certain specific constitutional violations and the remedies it ordered. We also conclude, however, that plaintiffs have established that the medical care at Michigan City is inadequate by constitutional standards and we therefore reverse and remand for further proceedings to determine further appropriate relief.

The state cross-appeals from the district court's damage award. We vacate the award and remand for consideration of whether the plaintiffs established at trial the requisite personal liability of defendants. We affirm the district court's denial of damages to plaintiffs who did not establish the personal responsibility of defendants.

Medical Care

When a state imposes imprisonment as a punishment for crime, it accepts the obligation to provide persons in its custody with a medical care system that meets minimal standards of adequacy. This obligation is enforceable in federal court, since inadequate medical care for prisoners violates the eighth amendment.[1] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *id.* at 116 n.13 ("denial of medical care is surely not part of the punishment which civilized nations may impose for crime.") (Stevens, J., dissenting). "When systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not

[1] The eighth amendment is applicable to the state through the fourteenth amendment. *Robinson v. California*, 370 U.S. 660 (1962).

hesitate to use its injunctive powers." *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (Kaufman, C.J.). Further, the policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Id.* at 54. *Compare Bell v. Wolfish*, 441 U.S. 520, 551 n.32 (1979) (deferring to prison officials' judgment on means to control smuggling of money, drugs and weapons into prison).

With respect to medical care, plaintiffs can establish an eighth amendment violation only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. at 104. As a practical matter, "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be demonstrated by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medicare care." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 1041 (1981). *See also Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977).

In the instant case, we think the record contains sufficient evidence of repeated instances of negligent medical treatment together with evidence of general systemic deficiencies to establish that there is deliberate indifference to serious medical needs such that unnecessary suffering is inevitable. For example, two of the three physicians at Michigan City are recent immigrants from Vietnam and, unfortunately, their English language skills are such that they cannot communicate effectively with their patients. A physician's assistant at the prison testified "I've seen [the prisoners] come out storming mad because they do not understand them." Tr. at 662. Even the *defendants'* medical expert testified that he observed a "language barrier between the

inmate and the physician on a number of occasions" and acknowledged that this problem could interfere with the quality and effectiveness of medical care. Tr. at 2152-53. An impenetrable language barrier between doctor and patient can readily lead to misdiagnoses and therefore unnecessary pain and suffering. This type of language problem which is uncorrected over a long period of time and as to which there is no prospect of alleviation, can contribute to unconstitutional deficiencies in medical care.

Nor has the state adequately staffed the psychiatric care component of Michigan City's medical care system. Treatment of the mental disorders of mentally disturbed inmates is a "serious medical need." *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Inmates v. Pierce*, 612 F.2d 754, 763 (3rd Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977); *Finney v. Mabry*, 534 F. Supp. 1026, 1037 (E.D. Ark. 1982). At Michigan City, however, the position of staff psychiatrist has been unfilled for over two years, and there seems to be no prospect of filling it. *Defendants'* medical expert saw this as "[t]he most obvious serious deficiency in health care at Indiana State Prison" because "without an on-site psychiatrist there is no one qualified to evaluate and treat psychiatric emergencies such as suicide and homicide candidates, or to follow patients who need to be maintained on long term psychotropic medications." DX HHH at 13. Maintenance on long term psychotropic medications enables patients to avoid the unnecessary suffering of acute episodes of mental illness. Without such care, repeated acute episodes can be predicted.[2] Tr. at 1002-03. As plaintiffs' psychiatric expert explained, a psychiatrist is

[2] Plaintiffs' psychiatric expert testified that, "[g]enerally, the occurrence of repeated episodes during which such an individual becomes floridly psychotic is accompanied by a progressive deterioration in psychological and intellectual functioning which leads to more and more serious impairment of that person's capability of adjustment." Tr. at 1004.

needed to supervise long term maintenance because "[a] regular physician, that is non-psychiatric physician is not really in a position to perform the evaluation to make decisions about drug dosage that would require the services of a psychiatrist." Tr. at 1003.[3]

The district court recognized the importance of on-site care, but decided against finding an eighth amendment violation in part because a psychiatric position was authorized for the prison and prison officials had been trying for two years to fill it. We think this circumstance may weigh more heavily against the state than for it, since the position has remained vacant for two years and the authorized salary is, in the district court's words, "woefully inadequate." Despite the apparent good intentions of prison officials, there seems to be no foreseeable cure for this serious systemic deficiency.

In addition, plaintiffs showed many individual instances of medical maltreatment, including several that the district court found constituted eighth amendment violations in and of themselves and for which the district court awarded damages. For example, James Hendrix was denied treatment for a stomach problem for two years, Melon Carroll was denied treatment for a painful abscess for five years and Grady Bobbitt was denied treatment for a dental problem for two years. The district court found that, "[t]hese individuals endured for extended periods of time a systematic failure to receive treatment, even though their ailments were made known." Order of November 25, 1981, Defendants-Appellees' Appendix at 97.

In addition, there was a good deal of evidence about the

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[3] Warden Duckworth testified that hiring a psychiatrist was the single greatest need he saw for the prison. A psychiatrist would not only be beneficial to the mentally ill patients themselves but would also benefit the rest of the inmates because the mentally ill patients make life less bearable for the majority. Tr. at 2340. Warden Duckworth explained that he has been unable to hire a psychiatrist because the authorized salary is too low and he cannot do anything about raising it

seemingly inadequate medical care received by James Stubblefield, who died of heart failure at age 47. Mr. Stubblefield first came to the prison infirmary at 3:00 PM on February 9, 1979, and complained of chest pains. His blood pressure and pulse were checked and he was sent back to his cell. By 6:00 PM, Mr. Stubblefield returned to the infirmary again complaining of chest pain. He appeared to be in "severe distress" and had trouble breathing. PX 88. Nevertheless, no physician came to check on Stubblefield. A prison doctor was called by telephone and he prescribed a mild tranquilizer. Stubblefield was then admitted to the prison infirmary. By 7:30 PM, Stubblefield's blood pressure had dropped to 60/40 and his pulse was irregular. Plaintiffs' medical expert and defendants' medical expert agreed that Stubblefield "had suffered some type of cardiovascular catastrophe at that point." "He was in cardiovascular shock." Tr. at 2120, 2121. Still no doctor came to see Stubblefield. At 9:45 PM, Stubblefield's blood pressure was still only 60/40 and his pulse rate was up to 120 beats per minute. The infirmary progress notes state, "request [the doctor] to come in again and again he declined." PX 88. Finally, after four attempts to get [the doctor] to see Stubblefield, the infirmary called a second prison doctor. This doctor prescribed some medication for Stubblefield, though he did not order that Stubblefield be sent to the hospital until midnight, nine hours after Stubblefield had begun alerting the prison personnel to his chest pain.

Plaintiffs' medical expert testified that there "were very serious deficiencies in the care of Mr. Stubblefield." Tr. at 755. Defendants' medical expert did not dispute this conclusion. *See* Tr. at 2119-23. Instead, defendants' medical expert testified that the modern treatment for cardiovascular shock is to place the patient in an intensive care unit. Yet five hours passed from the time Stubblefield was obviously in cardiovascular shock and the time he was finally taken to the hospital. He died the following day.

There also have been very disturbing problems in stocking necessary medical supplies. Tr. 639-40. One of the more distressing instances of this problem is the prison's apparently continuing difficulty in stocking disposable waste-collection bags for inmates who have had a colostomy. These inmates have been forced to wash out and re-use bags that are designed for single-use. A physician's assistant at the prison explained why this practice literally stank: "It's very foul smelling for one, causes problems in the cells next to the inmates. The seals on these are only designed to be used once so they do not seal properly afterwards. They do not drain correctly after being used." Tr. at 640.

Therefore, given the gross deficiencies in staffing, the shocking delays in treatment and the ongoing severe problems in stocking needed supplies, we think plaintiffs have established that there is a deliberate indifference to serious medical needs of prisoners at Michigan City such that a great deal of unnecessary suffering is inevitable. We, of course, recognize that many of these appalling medical deficiencies are closely related to the lack of funds to support these activities. We understand that prison officials do not set funding levels for the prison. But, as a matter of constitutional law, a certain minimum level of medical service must be maintained to avoid the imposition of cruel and unusual punishment.

Overcrowding

Defendants appeal from the district court's holding that Michigan City is unconstitutionally overcrowded: "[t]he most serious problem at the prison is simple overcrowding. Given the nature and age of the physical plant it is pervasive and cuts across all other issues here. Given the most generous application of judicial restrain it raises serious Eighth Amendment problems. In the context of the physical plant and the limits on staffing this overcrowding constitutes a violation of the Eighth Amendment of the

Constitution of the United States. This Court reaches this conclusion with greatest reluctance but the facts compel the conclusion." *Hendrix*, 525 F. Supp. at 527. Accordingly, the district court ordered a two-stage reduction in population from 1950 inmates at time of trial to 1750 inmates by December 31, 1982 and to 1615 inmates by December 31, 1983.

We think the district court's conclusion is broadly supported by the Record. Michigan City's physical plant is more than one hundred years old. Given its age, it is not surprising that there are problems with plumbing, electrical wiring and rodent and insect infestation. Routine maintenance in the cells, corridors and main food service area is deficient. As discussed above, the medical care system makes unncessary suffering inevitable, and overcrowding simply heightens this pain. Overcrowding also has resulted in extremely limited time for outside recreation and unreasonable periods of time some prisoners must spend locked in exceedingly cramped cells. For example, prisoners in the A & O Unit have been spending between 22 and 23½ hours per day in their cells, although the cells' floor space *only amounts to 17 square feet.* There was testimony that some inmates have not had outside recreation in five months. There has also been an extreme shortage of prison personnel in recent years. Hence, we agree with the district court that at current population levels Michigan City's physical and personnel resources are so overtaxed that unnecessary suffering is serious and inevitable.

Other Conditions of Confinement

Various prison conditions do not exist in isolation. Rather, challenged conditions must be viewed in the light of other prison conditions that may aggravate or mitigate the effect of the challenged conditions. For example, "the constitutionality of double-celling involves an assessment of many factors, including, *intera alia*, the duration of the

confinement, the size of the cells and the opportunities for inmates to leave their cells during the normal prison routine." *Madyun v. Thompson*, 657 F.2d 868, 872 n.5 (7th Cir. 1981). *See Ruiz v. Estelle*, 679 F.2d 1115, 1139-40 (5th Cir.), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1438 (1983); *Villaneuva v. George*, 659 F.2d 851, 854 (8th Cir. 1981) (en banc.). *See also Smith v. Fairman*, 690 F.2d 122, 125 (7th Cir. 1982). At the same time, "otherwise unquestionably constitutional conditions [do not] become unconstitutional by their aggregation." *Madyun*, 657 F.2d at 874 n.10. *But see Rhodes v. Chapman*, 452 U.S. 337, 362-63 (Brennan, J., concurring).

With these standards in mind, we have reviewed the evidence respecting plaintiffs' challenges to the prison's physical environment, the level of violence and several prison practices that are alleged to create unnecessary tension in the institution.[4] Based on this review, we cannot say that the district court erred in determining that these conditions of confinement were insufficient to establish further eighth amendment violations.

Damages

Plaintiffs appeal from the district court's denial of damages to the named plaintiffs in 81-3060. Decedents cross-appeal from the district court's award of five hundred dollars each to plaintiffs Hendrix and Bobbitt and one thousand dollars to plaintiff Carroll. Damages were awarded to these plaintiffs in 81-3061 for specific instances of medical maltreatment—these prisoners were denied adequate medical care for several years—and not for the general deficiencies in medical facilities and personnel.

[4] Plaintiffs argue that "unnecessary tension in the institution is created by arbitrary and racially harassing body cavity searches, harassment of visitors, illegal interference with inmate mail, frequent mismanagement of inmates' property coupled with an inadequate grievance system, unsafe work locations and arbitrary and capricious disciplinary procedures." Plaintiffs-Appellants' Brief at 10-11.

Defendants contend that none of the plaintiffs in 81-3060 or in 81-3061 presented at trial any evidence of personal involvement, knowledge or acquiescence in these denials of medical care by any of the named defendants. *See Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). The named defendants are the Warden, the Commissioner and the Director of Classification and Treatment.[5]

To recover damages under 42 U.S.C. §1983, a plaintiff must establish a defendant's personal responsibility for the claimed deprivation of a constitutional right. *Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981). The personal responsibility requirement is satisifed "if the official acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982).

We consider first the plaintiffs' argument for a modification. based on several of our cases, in the procedural requirements for proving defendants' personal responsibility. Thus, several of our cases have held that, under some circumstances the responsibility of senior prison officials can be assumed at the pleading stage, pending discovery of those who were directly responsible for whatever deprivation may have occurred. *Duncan*, 644 F.2d 653, 655; *Chavis v. Rowe*, 643 F.2d 1281, 1290 n.9 (7th Cir.), *cert. denied*, 454 U.S. 907 (1981). Plaintiffs argue that this rule should be applied and extended in the case before us so that a named defendant's liability may be presumed until the defendant identifies who was directly responsible if the named defendant was not. "If those officials so named or called to testify all remain silent as to the persons responsible for the deprivations and such information is in the hands of defendants but not necessarily discoverable by

[5] The "treatment" referred to in Edward Jones' job title apparently does not mean medical treatment. *See* Tr. at 1953-91.

plaintiffs, then liability should attach to those officials who are in a position to know but, through a conspiracy of silence, do not disclose that information." Plaintiffs-Appellants' Reply Brief at 23.

This argument is similar to one that carried the day for the plaintiff in *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P. 2d 687 (1944). Mr. Ybarra suffered an injury of unknown origin to his shoulder between the time he was anesthetized for an appendectomy and the time he awoke in the recovery room. Ybarra argued that res ipsa loquitur should be applied against all of the doctors and hospital employees connected with the operation, though presumably not all of them were responsible. The defendants argued that they were entitled to a dismissal because the plaintiff had not shown which of the defendants was responsible for his injury. The California Supreme Court held that Ybarra could proceed to trial because under the circumstances it was appropriate to place the burden of initial explanation for the injury on the defendants. At the subsequent trial, each of the testifying defendants denied seeing anything occur that could have caused the injury to the plaintiff. The trial court held, however, that this evidence did not overcome the plaintiff's prima facie case and entered judgment against all the defendants. The California appellate court affirmed the judgment. *Ybarra v. Spangard*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949) ("*Ybarra* II").

The principle basis for applying res ipsa loquitur in *Ybarra* apparently was the special circumstances of the medical personnel-patient relationship. "The basis of the decision appears quite definitely to have been the special responsibility for the plaintiff's safety and undertaken by everyone concerned." W. Prosser, HANDBOOK OF THE LAW OF TORTS 223 (4th ed. 1971). If so, *Ybarra* is analogous to the case before us insofar as prison authorities have a special responsibility to inmates who are totally dependent upon them to receive medical treatment. *Estelle*, 429 U.S.

at 103. *Ybarra* is, however, not analogous to the degree that these plaintiffs, unlike Ybarra, were not unconscious at the time they suffered the alleged injuries.

Considering all relevant factors, we do not think it appropriate in the case before us to extend, in the fashion of *Ybarra* II, the presumption of senior prison official responsibility beyond the pleading stage. *See Duncan*, 644 F.2d 653. Unlike *Ybarra*, the defendants here are not the individuals who were immediately responsible for plaintiffs' care. Also, unlike *Ybarra* in which the standard of liability was mere negligence, in the instant case negligence would not be enough, *Estelle*, 429 U.S. at 106. We are reluctant under these facts to presume a higher degree of culpability. Finally, although prisoners are to some extend handicapped in identifying who precisely is responsible for their maltreatment, we cannot say that they are so limited in their access to information that the burden of explanation should be shifted to defendants beyond the point indicated in *Duncan*, 644 F.2d 653. We confront the problem here after trial, when through discovery and otherwise, there should have been an opportunity to identify the directly culpable parties. As indicated above different considerations would apply on a motion to dismiss or otherwise early in the proceedings.

We next consider plaintiffs' entitlement to damages under the existing standards. With respect to the plaintiffs in 81-3060, the district court denied them damages because they had not shown that any of the named defendants were responsible for the injuries they suffered. *Hendrix*, 525 F.Supp. at 447, 450, 454, 457, 459 and 463. Having reviewed the evidence and plaintiffs' arguments, we cannot conclude that the district court erred in finding that the personal responsibility requirements of *Adams v. Pate*, 445 F.2d 105, and its progeny were not satisfied. Of course, the same principles governing personal responsibility apply to the medical claims of these plaintiffs as to the claims of

Hendrix, Bobbitt and Carroll, explained below, and the district court, if appropriate, may consider this on remand.

With respect to those plaintiffs in 81-3061 who were awarded damages (Messrs. Hendrix, Bobbitt and Carroll), we vacate the awards and remand for clarification and appropriate disposition. The district court, in its post-trial Order, stated with respect to Hendix, Bobbitt and Carroll:

> These individuals endured for extended periods of time a systematic failure to receive treatment, even though their ailments were made known.

Order of November 25, 1981, Defendants-Appellees' Appendix at 97. This statement of the district court can be read as suggesting that some or all of the named defendants knew of and acquiesced in the nontreatment of these plaintiffs so that there may be an "affirmative link" between the defendants and the constitutional violation. *See Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). After making this statement, however, the district court cited *Duncan v. Duckworth*, 644 F.2d 653 (7th Cir. 1981). As we discussed above, exclusive reliance on *Duncan* to establish liability of persons having no "affirmative link" to the constitutional violation would be inappropriate in this case after trial on the merits. On the other hand, there may be a connection through "systemic" conditions for which senior prison officials may have been responsible. Presumably, the latter circumstance would involve problems of proximate cause which we are not now in a position to evaluate. Thus, we vacate the award and remand for clarification of the plaintiffs' entitlement to damages under *Adams v. Pate*, 445 F.2d 105, and its progeny.

Costs

The district court held that each party should bear its own costs. This court follows the general rule about the award of costs, namely, that there is a presumption in favor

of awarding costs to the prevailing party. *Popeil Brothers, Inc. v. Schick Electric, Inc.*, 516 F.2d 772, 774-75 (7th Cir. 1975). To prevent an award of costs, the losing party must overcome the presumption. *Id.* at 775.

In light of the additional relief we have ordered herein, we vacate the district court's order and remand for a determination by the district court whether costs should now be awarded to plaintiffs. *See* 6 J. Moore, W. Taggart, & J. Wicker, MOORE'S FEDERAL PRACTICE ¶54.70 (2d ed. 1982).

The cause is affirmed in part, vacated in part and remanded for further proceedings in accordance with this opinion.

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Cudahy
JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 9, 1983

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. PAUL C. WEICK, *Senior Circuit Judge**

BRUCE D. WELLMAN, et al., *Plaintiffs-Appellants, Cross-Appellees,*	)	Appeals from the United States District Court for the Northern District of Indiana,
Nos. 81-3060, *vs* 81-3061	)	South Bend Division.
GORDON H. FAULKNER, et al., *Defendants-Appellees, Cross-Appellees.*	)	Nos. 76-C-187, 77-C-035, and 79-C-032 Allen Sharp, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, VACATED in part and REMANDED, in accordance with the opinion of this Court filed this date.

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*The Honorable Paul C. Weick, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

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